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Decision

Matter of: Williams Building Company, Inc.

File: B-415317.3

Date: April 12, 2018

Joseph A. Camardo Jr., Esq., Camardo Law Firm, PC, for the protester.
Neil B. Connelly, Esq., Brown Gruttadaro Gaujean Prato Sastow PLLC, for the intervenor.
David W. Altieri, Esq., Donald C. Mobly, Esq., Department of Veterans Affairs, for the agency.
Mary G. Curcio, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bid that was submitted after the time established for the receipt of bids in the solicitation is late and may not be accepted where government mishandling was not the primary reason that the bid was submitted late.

DECISION

Williams Building Company, Inc., of West Yarmouth, Massachusetts, protests the rejection of the bid it submitted under invitation for bids (IFB) No. VA242-17-B-0713, issued by the Department of Veterans Affairs for construction services. Williams argues that the agency improperly rejected its bid as late.

We deny the protest.

BACKGROUND

As relevant to this protest, bid opening was scheduled for September 13, at 9:00 a.m., Eastern Standard Time.¹ Agency Report (AR), Exh. 2, IFB amend. 6 at 1. Williams initially submitted its bid to the contracting officer at 8:30 a.m. on September 13. Contracting Officer's Statement (COS) at 1. However, at approximately 9:00 a.m., the

¹ All times set forth in the decision are Eastern Standard Time.

Williams' representative asked if he could change Williams' bid. Id. The contracting officer, believing that Williams intended to exchange one envelope for another, handed the representative the unopened envelope containing the bid. Id. The Williams' representative opened the sealed envelope, wrote something down, and inserted a bid sheet. Id.; Protest at 3-4. Although the representative intended to remove the original bid sheet, he failed to do so. Protest at 3-4. The representative returned the bid package to the contracting officer at 9:02 a.m. COS at 1. At 9:03 a.m. the contracting officer read the four bids that had been submitted, including Williams' bid. Id. Williams' bid package contained two offer forms (standard form (SF) 1442): one in the amount of \$4,929,583; and a second one in the amount of \$4,795,139, which was written next to a crossed out amount of "\$4,7195." COS at 1-2; AR, Exh. 3, Williams' Bid Package. The contracting officer read the Williams' bid as \$4,929,583. COS at 1- 2. Nordstrom Contracting and Consulting Group submitted the second lowest bid of \$5,385,000. Id. Following protests by Williams and then Nordstrom, the agency rejected Williams' bid as late.² Williams protests that decision.

DISCUSSION

Williams argues that its bid should be accepted because it is clear that its original bid was \$4,795,139. Protest at 5. Specifically, according to Williams, the envelope in which its bid was submitted contained, in addition to the two SF 1442's, a bid sheet on which Williams crossed out the initial quote \$4,795,139 and hand wrote the amended quote \$4,929,583. Id. The protester argues that when an attempted bid modification (its attempt to change the bid from \$4,795,139 to \$4,929,583) is invalid, the bidder is bound by its initial bid. Id. at 6. Thus, according to Williams, if its modified bid--\$4,929,583--was late, the agency could accept its original bid--\$4,795,139, that was submitted at 8:30 a.m.

The agency argues that when the contracting officer returned the original sealed bid package to Williams, the agency relinquished control over the bid. Memorandum of Law (MOL) at 5. The agency further argues that when Williams returned the bid package to the contracting officer after 9:00 a.m., Williams' bid was late and properly

² The agency initially rejected Williams' bid as late. Williams protested that decision to our Office and the agency took corrective action, awarding the contract to Williams for the amount the agency believed was Williams' original bid (\$4,795,139). We dismissed Williams' protest. Williams Building Co., Inc., B-415317, Oct. 18, 2017 (unpublished decision). Subsequently Nordstrom, the second lowest bidder, protested the award to Williams. Our Office used alternative dispute resolution procedures to resolve Nordstrom's protest, informing the parties that we would likely sustain the protest on the basis that the agency improperly accepted Williams' late bid. We dismissed Nordstrom's protest after the agency took corrective action and terminated the award to Williams. Nordstrom Contracting and Consulting Corp., B-415317.2, Jan. 25, 2018, (unpublished decision). This protest followed.

rejected. Id. Finally, the agency states that there was no bid sheet in the envelope with Williams' bid, but only the two SF 1442's for \$4,795,139 and \$4,929,583. MOL at 5.

Bidders are responsible for submitting bids, and any modifications or withdrawals, so as to reach the government office designated in the invitation for bid by the time specified in the IFB. Federal Acquisition Regulation (FAR) § 14.304; IFB amend. 2 at 50 (incorporating by reference FAR provision 52.214-7). A bid must be submitted so that it is received in the office designated in the IFB not later than the exact time set for the opening of bids. Weeks Marine, Inc., B-292758, Oct. 16, 2003, 2003 CPD ¶ 183 at 3. The time a hand-carried bid is considered submitted is determined by the time the bidder relinquishes control of the bid to the government. Id.; Chestnut Hill Constr., Inc., B-216891, Apr. 18, 1985, 85-1 CPD ¶ 443 at 3.

Here, Williams took its bid back, and did not relinquish control of the bid to the government until 9:02 a.m., after the time set for bid opening. Therefore, the bid was late. Further, although Williams argues that the agency could accept its original bid of \$4,795,139, which it contends was submitted at 8:30 a.m., we disagree. Since there were two bids in the Williams' bid package, there is no way to determine which bid was the original bid. Moreover, what Williams alleges is its original bid--\$4,795,139--was in the bid package that Williams submitted to the contracting officer after the 9:00 a.m. time set for bid opening and therefore was late. Again, when Williams took its bid package back, it took the bid that was submitted at 8:30 a.m. out of the government's control and when it resubmitted the package at 9:02 a.m., the entire bid package, including both bids, was late.

Williams also asserts that its modified bid should have been accepted in accordance with FAR provision 52.214-7, which was incorporated into the solicitation, and provides as follows:

(b) (1) Any bid, modification, or withdrawal received at the Government office designated in the IFB after the exact time specified for receipt of bids is "late" and will not be considered unless it is received before award is made, the Contracting Officer determines that accepting the late bid would not unduly delay the acquisition; and –

* * *

(ii) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of bids and was under the Government's control prior to the time set for receipt of bids

IFB amend. 2 at 50 (incorporating by reference FAR provision 52.214-7). We are unsure on what basis Williams believes this FAR provision would permit the agency to accept its modified bid. Under this provision, a late modification may be considered if it was under the government's control prior to the time set for the receipt of bids. Here, even if it could be discerned which bid was the original and which bid was the modification, the modification was nevertheless not under the government's control until

after the time set for the receipt of bids had passed. The modification therefore was late and cannot be accepted.

Williams also argues that its late bid should be accepted because it was late as a result of government misdirection. Protest at 6. In this regard, Williams asserts that since the contracting officer returned the bid to Williams to revise it, Williams believed that it had enough time to modify its bid and timely re-submit it.

Since an agency has an affirmative duty to establish procedures for the timely receipt of bids, a late bid may be accepted where the government's affirmative misdirection--such as erroneous solicitation instructions--was the paramount cause of a bidder's untimely delivery of its bid. Select, Inc., B-245820.2, Jan. 3, 1992, 92-1 CPD ¶ 22 at 4. A late bid may also be accepted where the late receipt was due primarily to government mishandling after the bid's receipt at the installation or in the process of receiving the bid. Adirondack Constr. Corp., B-280015.2, Aug. 25, 1998, 98-2 CPD ¶ 55 at 3. Here, there were no erroneous solicitation instructions or other government misdirection. Further, even if the contracting officer's decision to return the bid to Williams was in part responsible for the late submission, Williams itself initiated the return of the bid. Accordingly, government action was not the paramount cause that the bid was submitted late.

Williams also asserts that its bid was not late because it is up to the bid opening officer to decide when the time set for opening bids occurs. Protest at 5. According to Williams, since the contracting officer did not announce the time for bid opening, and did not start reading the bids until after Williams re-submitted its bid, the bid was in fact timely submitted. Id.

Pursuant to FAR § 14.402-1(a), the bid opening officer must decide when the time set for opening bids has arrived and must inform those present of that decision. Generally, the bid opening officer's declaration of bid opening time is determinative of lateness unless it is shown to be unreasonable under the circumstances. Hi-Grade Logging, Inc., B-222230, B-222231, June 3, 1986, 86-1 CPD ¶ 514 at 2. The absence of a formal announcement that no further bids will be accepted, however, is irrelevant since a bid opening officer has no authority to accept a bid clearly submitted after the deadline. See Chestnut Hill Constr., Inc., *supra*, at 3; George W. Kane, Inc., B-245382.2, Feb. 4, 1992, 92-1 CPD ¶ 143 at 4.³ Thus, the fact that the bid opening

³ In situations where there has been a question of whether a bid was submitted timely, we have stated that the contracting officer's declaration of bid opening time is determinative of lateness unless it is shown to be unreasonable under the circumstances. Chattanooga Office Supply Co., B-228062, Sept. 3, 1987, 87-2 CPD ¶ 221 at 2; Carothers Const., Inc., B-235910, Oct. 11, 1989, 89-2 CPD ¶ 338 at 3. Accordingly, a bid is late if submitted after the contracting officer announces that the time for bid opening has arrived. Id. These cases, however, do not stand for the proposition that the contracting officer can change the bid opening time that was

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officer did not announce that the time for bid-opening arrived, and accepted Williams' bid after the time set for bid opening, does not provide a basis on which the late bid can be considered.

Finally, the protester argues that there was no prejudice because both of the bids in the envelope it submitted were low. Protest at 7. However, a late bid must be rejected even though it may be more advantageous to the government than those bids timely received, since the maintenance of confidence in the integrity of the government procurement system is of greater importance than the possible advantage to be gained by considering a late bid in a particular procurement. Discovery Int'l, Inc., B-219664.2, Nov. 19, 1985, 85-2 CPD ¶ 565 at 2; Hi-Grade Logging, Inc., supra.

The protest is denied.

Thomas H. Armstrong
General Counsel

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established in the solicitation. They concern situations where the accuracy of the clock relied on by the contracting officer is called into question, see id., or where a bid was clearly in the government's control by the time stated in the solicitation. See Amfel Constr., Inc., B-233493.2, May 18, 1989, 89-1 CPD ¶ 477 at 3.